United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued By
GARY P. NAFTALIS

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1698

UNITED STATES OF AMERICA,

Appellee,

- against -

WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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1

INDEX TO BRIEF

TABLE OF CASES CITED

Page

OTHER AUTHORITIES CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

Appellee,

- against -

Docket No. 74-1698

WILSON TORRES,

Defendant-
Appellant.

----------x

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

Questions Presented

1. Whether a conviction for conspiracy may stand where the appellant performed a single act and had no knowledge of the broader conspiracy charged in the indictment?

2. Whether the conviction must be reversed because the cross-examination of the key Government witness was restricted and the prosecutor inaccurately characterized the facts regarding this witness in summation?

3. Whether the verdict must be set aside where one of the Assistant United States Attorneys trying the very

case testified to impeach the Government's own witness and the Government attempted to make affirmative use of its witness' prior inconsistent statements?

Preliminary Statement

Wilson Torres appeals from a judgment of conviction entered on May 17, 1974, in the United States District Court for the Southern District of New York after a three day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 72 CR. 391 charged appellant in one count with conspiracy to violate the federal narcotics laws in contravention of Title 21 U.S.C. §§841 and 846. Trial commenced on March 25, 1974, before Judge Wyatt and a jury, and on March 27, 1974, the jury returned a verdict of guilty. On May 17, 1974, Judge Wyatt sentenced appellant to one year imprisonment. Mr. Torres is presently serving that sentence.

Statement of Facts

The Government's case at trial rested essentially upon the testimony of one witness, New York City police officer Jose Guzman.

Detective Guzman testified that, while acting in an

undercover capacity, he purchased one ounce of heroin on January 18, 1972, from Jose Sanjurjo and Hector Ortiz, in the vicinity of 2353 Second Avenue in Manhattan* (Tr. 34-41). This was the only sale of narcotics that occurred in the instant case and it is undisputed that the appellant Wilson Torres had nothing whatsoever to do with this transaction (Tr. 65-66; 138). Nor was there any evidence that Mr. Torres had any knowledge of this transaction and Government counsel so conceded. (Minutes of March 25, 1974, p. RMSF-10).**

Guzman further testified that, approximately one month later, on February 14, 1972, he unsuccessfully attempted to make a second purchase of narcotics from Jose Sanjurjo (Tr. 64). On that night, Guzman went to the vicinity of 121st and Second Avenue and negotiated with Hector Ortiz, Jesus Sanjurjo*** and Jose Sanjurjo to purchase 1/8 kilogram of heroin for $3,600 (Tr. 46-53). Wilson Torres did not participate in these negotiations (Tr. 67-8). The first time Guzman ever met Wilson Torres was later in the

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*Ortiz and Sanjurjo were also named as defendants in the instant indictment and plead guilty.

**The chronological pagination of the trial transcript begins with the opening statements. The minutes of the trial which preceded the opening statements are not chronologically paginated.

***Jesus Sanjurjo, who was the brother of Jose Sanjurjo, was also a defendant in this case and was convicted in a separate trial.

evening of February 14, 1972, when Torres entered Guzman's car in which Hector Ortiz and his wife Lillian were also present. Torres told Guzman to drive to 120th Street and Second Avenue where he was going to "pick up the material". According to Guzman, either Torres or Lillian Ortiz (he wasn't sure which one) stated that the "connection" had to protect himself and that Jesus Sanjurjo would follow them to make certain that the police weren't following them. At 120th Street and First Avenue, Wilson Torres exited the car and again stated that he was going to get the "package". Later that evening, on 96th Street and Second Avenue, Torres returned to Guzman's car and stated that he was going to bring the "package or the material". Torres then left and never returned. No heroin was sold to Agent Guzman (Tr. 56-60).

Having failed in his attempt to purchase narcotics on February 14, 1972, Guzman returned to 2353 Second Avenue on February 22, 1972 to make another attempt to buy drugs. Guzman observed Jesus Sanjurjo and Wilson Torres sitting in a white car and Guzman motioned to Jesus Sanjurjo (not to Torres) to come to his car and Sanjurjo did, while Torres remained in the car. Guzman then told Jesus Sanjurjo (outside the presence of Wilson Torres) that he wanted to buy one ounce of heroin. Sanjurjo told Guzman to return the next evening. When Guzman returned the next night, Jesus Sanjurjo

never showed up and once again no narcotics were purchased (Tr. 61-64).

On cross-examination, it was established that Guzman had never included in his detailed contemporaneous report of the events of February 14, 1972 (GX 3502) two of the conversations that he claimed he had with Torres (Tr. 74-77). Similarly, when Guzman testified in a prior trial of the defendant Jesus Sanjurjo and was questioned about the events of February 14, 1972, he never mentioned one of the conversations he allegedly had with Torres (Tr. 81-83).

New York City policeman John Miller testified that he conducted a surveillance of policeman Guzman on February 14 and 22, 1972. During his surveillance on the evening of February 14, 1972, Miller observed Guzman and Wilson Torres together for a total of only three minutes. Miller did not overhear any conversation that Guzman and Wilson Torres had that evening (Tr. 140-142). Contradicting Guzman's testimony, Miller testified that he did not see Wilson Torres during his surveillance of Guzman on February 22, 1972 (Tr. 102, 141). Miller also testified that he arrested Wilson Torres and that Torres "declined to make any statements" (Tr. 104). A motion for a mistrial on the ground that this testimony was an improper comment on Torres' Fifth Amendment privilege

was denied (Tr. 111-12).

State Trooper Lawrence McDonald testified that he also conducted a surveillance of Officer Guzman on the night of February 14, 1972. McDonald observed Wilson Torres and Officer Guzman together for a total of only one minute (Tr. 156-7).*

Hector Ortiz, a co-defendant who had plead guilty and was awaiting sentence, was called by the Government. Judge Wyatt overruled Ortiz's Fifth Amendment plea and compelled him to testify without immunity (Tr. 128). In a hearing outside the presence of the jury, prior to his being called as a witness, Ortiz testified under oath in a manner in no way helpful to the Government (Tr. 129-134). Chief Government Counsel then informed the Court that the Government intended to call Ortiz as a witness only if the other Assistant United States Attorney, Robert Hemley, Esq., trying this case would be permitted to testify to impeach Ortiz. No factual showing was made that Assistant United States Attorney was the only person who could so testify. Defense counsel vigorously objected and moved for a mistrial. Judge Wyatt ruled that the Assistant United States Attorney could testify, and that it was up to the Government to deter-

*The Government also introduced evidence that Torres was a fugitive from the time of his arrest until he was found approximately 2 years later in Puerto Rico.

mine whether they wished to take the risk. To which the Assistant United States Attorney replied:

> "I take it we will go forward and the Government will assume the risk." (Tr. 157-60).

Ortiz was then called as a witness. When questioned about the events of February 14, 1972, Ortiz testified that he did not know who was supposed to deliver the heroin that day (Tr. 163). The prosecutor then attempted to impeach Ortiz with an alleged oral statement he had previously made to narcotics agents. Ortiz denied that he had ever told these narcotics agents that Wilson Torres was supposed to deliver the heroin on February 14, 1972 (Tr. 163-4). The prosecutor then proceeded to ask Ortiz if he had ever told the narcotics agents that Torres was a courier who delivered heroin back and forth between Puerto Rico and New York. Ortiz denied making any such statement (Tr. 166). A motion for a mistrial was made on the ground that the prosecutor in the guise of attempting to impeach Ortiz's testimony regarding the events of February 14, 1972, (for which Torres was on trial) had attempted to bring in other criminal activities for which Torres had not been indicted. This motion was denied (Tr. 168-9; 172-4).

Assistant United States Attorney Robert Hemley, one

of the prosecutors trying the case, testified over objection that on the first day of the trial, Ortiz and Torres "shook hands" in the courtroom and spoke for four or five minutes (Tr. 181). Ortiz had never been asked by the prosecutor about this incident, which was the subject of Hemley's testimony.

The appellant Wilson Torres did not testify in his own behalf and no defense witnesses were called.

ARGUMENT

POINT I

TORRES' SINGLE ACT OF PROMISING TO DELIVER HEROIN WHICH WAS NEVER DELIVERED WAS INSUFFICIENT TO IMPLICATE HIM IN THE BROADER CONSPIRACY CHARGED IN THE INDICTMENT.

The instant indictment alleged a conspiracy among four defendants, (including appellant Torres), and others to the Grand Jury "unknown" to possess and distribute narcotics beginning on December 1, 1971, and, according to the overt acts, continuing at least through February, 1972. Three of the overt acts related to the sale of one ounce of heroin on January 18, 1972, for $1,000. There is no allegation in the indictment nor was any proof elicited at the trial that the appellant Torres either had knowledge of or participated in this transaction. Indeed, Government counsel conceded that Torres had no knowledge of the January transaction (Tr. RMSF-10 of minutes of March 25, 1974). The sole act attributed to the appellant Torres occurred approximately one month later on February 14, 1972. On that evening, Torres told Officer Guzman that he would deliver the "package or material" (heroin) to him. No delivery of narcotics or anything else was ever made by Torres. This single inchoate act of Torres is plainly insufficient to hold Torres respon-

sible for the broader conspiracy charged in the indictment.

It is well settled that a single act is not sufficient to draw an individual within the ambit of a conspiracy to violate the federal narcotic laws, unless there is proof that he had knowledge of the broader conspiracy. United States v. DeNoia, 451 F.2d 979, 981 (2d Cir. 1971); United States v. Aviles, 274 F.2d 179, 190 (2d Cir.), cert. denied, 362 U.S. 974 (1960); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir.), cert. denied, 361 U.S. 863 (1959); United States v. Reina, 242 F.2d 302, 306 (2d Cir.), cert. denied, 354 U.S. 913 (1957); United States v. Koch, 113 F.2d 982 (2d Cir. 1940).

Thus, where the sole act performed by a defendant is the delivery of narcotics from the conspirators to the purchaser, (usually a policeman or federal narcotics agent), this Court has found such an act insufficient to link the defendant to the conspiracy and dismissed the indictment. In Stromberg, supra, the Court dismissed the indictment when the single act was the delivery of two suitcases with narcotics in them. Similarly, in Reina, supra, the Court dismissed where the single act was the actual sale of the narcotics.

Directly in point is the case of United States v. DeNoia, supra. In DeNoia, (like in the instant case), the alleged conspiracy encompassed two transactions. The first transaction was the sale of narcotics to an undercover agent by defendants other than DeNoia. The second transaction also involved the sale of narcotics to the same undercover agent and DeNoia delivered the heroin. The Court reversed DeNoia's conviction on the conspiracy count and held:

> "As to Denoia, however, we find no independent evidence linking him to the conspiracy. DeNoia's delivery of the heroin is not the kind of single transaction which supports an inference of knowledge of a broader conspiracy." (451 F.2d at 981).

As in the instant case, as in DeNoia, there were two transactions - the first sale in January in which Torres was in no way involved and a second attempted sale in February in which Torres promised to deliver heroin which was never even delivered. Indeed, Torres' involvement was even less than that of the defendant in DeNoia, because Torres never even delivered or handled any narcotics.

Moreover, as was conceded by Government counsel, there is not the slightest evidence that Torres had knowledge of the January narcotics case -- and, therefore, of the broader conspiracy. Thus, a fortiori, the proof is insufficient as to Torres and his conviction must be reversed and the indictment dismissed.

POINT II

REVERSIBLE ERROR WAS COMMITTED BY THE GOVERNMENT'S IMPROPER ATTEMPTS TO "IMPEACH" ITS WITNESS ORTIZ AND THE IMPROPER USE OF ORTIZ'S TESTIMONY IN THE PROSECUTOR'S SUMMATION

Hector Ortiz, a co-defendant who had plead guilty and was awaiting sentence, was called by the Government as a witness. The prosecutor knew in advance that Ortiz would not provide any helpful testimony (Tr. 129-34). Rather, Ortiz was called so the Government could "impeach" him with a prior oral statement and with the testimony of Robert Hemley, one of the Assistant United States Attorneys trying this very case (Tr. 157-60). This impeachment exceeded permissible bounds and was reversible error.

When questioned about the events of February 14, 1972, Ortiz testified that he did not know who was supposed to deliver the heroin that day. The prosecutor then asked Ortiz if he had told narcotics agents that Wilson Torres was supposed to make the delivery. Ortiz denied ever having made such a statement (Tr. 163-4). Without laying any foundation, the prosecutor then asked Ortiz if he had ever told the agents that Torres was a courier who delivered the heroin back and forth between New York and Puerto Rico (Tr. 165-6). Again, Ortiz denied making such a statement. This question was completely improper and its effect was to prejudice Torres' right

to a fair trial. Ortiz had only been questioned about the events of January and February, 1972 -- which were the subject of the indictment. He had only given one answer which allegedly "surprised" the prosecutor. Ortiz was never asked any direct questions regarding other activities of Torres. Thus, there was no basis upon which to impeach Ortiz with a prior hearsay statement for no direct testimony of Ortiz was being contradicted. 3A Wigmore, Evidence §1040 (McNaughton Rev. 1970).

Moreover, this question was doubly improper for it lead the jury to believe that Torres had been involved in other illicit narcotics activities for which he was not on trial. Thus, the prosecutor was filling in the gaps in an otherwise thin case and improperly conveying the impression to the jury that Torres was a narcotics dealer where there was no proof that Torres ever had sold or handled any narcotics. Such gap filling by a prosecutor beyond the scope of the transcript is clearly improper. United States v. Bivona, 487 F.2d 443 (2d Cir. 1973); United States v. Puco, 436 F.2d 761 (2d Cir. 1971); Reichert v. United States, 359 F.2d 278 (D.C. Cir. 1966).

As the Court pointed out in King v. United States, supra, at 372 F.2d 394: "It is elementary that a prosecutor

may not import his own testimony into a criminal trial."

The prejudice was further enhanced when Robert Hemley, one of the Assistant United States Attorneys prosecuting this case, then took the stand and testified over vigorous objection (Tr. 157-160), that he had observed Ortiz and Torres shake hands and converse in Court the day before (Tr. 181). No foundation was laid for this impeachment because Ortiz had never been questioned about this incident. Rather, this testimony was apparently designed to impeach Ortiz's testimony that he knew Torres only by sight. The Government made no factual showing that none of the other people who were in the courtroom at the time Torres and Ortiz allegedly conversed, who included marshalls, court clerks, court reporters and interpreters, were unavailable to testify (Tr. 157-60). See United States v. Alu, 246 F.2d 29, 33-34 (2d Cir. 1957).

The prosecutor in summation made much of co-counsel Hemley's testimony. He argued that co-prosecutor Hemley's testimony showed that Ortiz was lying about Torres' involvement in the narcotics deal (Tr. 232-33). Indeed, the prosecutor argued that Ortiz didn't want to tell the jury "that his friend, Wilson Torres was the guy who sold the heroin", (Tr. 233). Of course, there was never any evidence at trial

that Torres ever sold any heroin. However, by improperly interjecting the credibility of one of the Assistant United States Attorneys trying this case into issue, the Government asked the jury to conclude that Torres "was the guy who sold the heroin", although there was no evidence of this at trial.*

In United States v. Pepe, 247 F.2d 838 (2d Cir. 1957), the Court of Appeals per Chief Judge Lumbard reversed a conviction where the prosecutor took the stand to impeach the testimony of a Government witness who had failed to identify the defendant. The Court held that striking the testimony (something which wasn't even done in the instant case), was insufficient to eradicate the prejudice and strongly condemned the prosecutor for testifying as a witness.

> "...we deplore the practice of a government prosecutor so injecting himself into the trial of a case unless doing so is unavoidable. If it appears that he is to be a witness for the government, and obviously there are times when that cannot be avoided, the trial of the case should be entrusted to a colleague. See: United States v. Alu, 2 Cir., 246 F.2d 29.
>
> The almost inevitable effect of al this, when taken together with the somewhat dubious identification by the government agents, was to lead the jury

*Later in his summation, the prosecutor again told the jury that they could find Torres "was selling narcotics" (Tr. 234), although there was no such evidence.

> to believe that Howard was not telling what he knew about Buono and had welched on his previous identification for fear of reprisal. The trial judge's conviction that the jury would believe that Howard had previously identified Buono and that it would therefore take the evidence affirmatively and believe that Buono was the lessee of the apartment was certainly warranted. We do not believe that striking the evidence and instructing the jury was sufficient to protect the rights of the defendant Buono. The case was a close one at best and the impression made by this evidence and the unanswered questions was so prejudicial that the motion for a mistrial should have been granted." (247 F.2d at 844).

Similarly, the instant case was a close one which depended solely upon the testimony of police officer Guzman, whose credibility had been vigorously assailed. (See Point III, infra).

Moreover, the testimony of Assistant Hemley and the subsequent summation clearly establishes that the prosecution was improperly asking the jury to accept prior inconsistent statements as affirmative evidence and find from them that Torres was a narcotics dealer. United States v. Kahaner, 317 F.2d 459, 473-474 (2d Cir.), cert. denied, 375 U.S. 835 (1963); United States v. Cunningham, 446 F.2d 194, 197, 198 (2d Cir.), cert. denied, 404 U.S. 950 (1971); United States v. Briggs, 457 F.2d 908, 910 (2d Cir.), cert. denied, 409 U.S.

986 (1972).

United States v. Block, 88 F.2d 618 (2d Cir.), cert. denied, 301 U.S. 690 (1937), presents a strikingly similar fact situation to the case at bar. In Block, supra, the Government called the brother of one of the defendants, who testified in a manner not helpful to the Government. The prosecutor had the witness declared hostile and read the witness' prior inconsistent statement aloud and asked the witness if the statement were true. The witness answered in the negative, saying he gave the prior statement out of fear. This Court reversed on the ground that the prior statement was hearsay and allowing it before the jury was prejudicial. The Court reasoned that even though the witness was clearly lying, the prosecution could not properly place the prior inconsistent statement before the jury and, therefore, make an affirmative use of it. Moreover, the Court further concluded that since the witness was obviously trying to protect the defendants, allowing his prior inconsistent statement into evidence permitted the jury to get the impression that the defendants were suborning perjury.* See United

*So, too, in the instant case, the jury could easily draw the inference that Torres was suborning perjury. Ortiz testified in response to the prosecutor's questions that he had been "scared because of my family" (Tr. 161). The prosecutor argued to the jury in summation that his own witness Ortiz was lying to protect Torres (Tr. 232-33). The jury could well have concluded that Ortiz had testified falsely at the urging of Torres.

States v. Duff, 332 F.2d 702 (6th Cir. 1964), (citing Block with approval), and Bridges v. Wixen, 326 U.S. 135, 153 (1945) [also citing Block with approval].

In sum, the prosecutor's actions regarding co-defendant Ortiz improperly conveyed the impression that Torres was more culpable than the evidence actually indicated and deprived Torres of the fair trial to which he was entitled.*

*The prejudicial errors in this case were compounded by the testimony of Detective John Miller that upon arrest Torres exercised his Fifth Amendment right and refused to give a statement (Tr. 104). Despite a corrective charge by the trial judge, the inherent prejudice created by this testimony was clearly grounds to support Torres' motion for a mistrial, which was denied (Tr.111). This is especially true in light of the general weakness of the Government's case. C.F. United States v. Rivera, ___F.2d___(Slip.Op. 1024, May 17, 1974).

POINT III

CROSS-EXAMINATION OF THE GOVERNMENT'S PRINCIPAL WITNESS GUZMAN WAS IMPROPERLY RESTRICTED AND THE JURY WAS MISLEAD REGARDING GUZMAN'S TESTIMONY AT A PRIOR TRIAL.

The Government's case at trial rested almost exclusively upon the testimony of New York City policeman Guzman regarding his conversations with Wilson Torres on the evening of February 14, 1972. Without Guzman's testimony, there simply would have been no case. Guzman was the only witness who testified as to any conversations that Torres had regarding narcotics. Guzman's credibility was vigorously attacked both on cross-examination and summation by defense counsel. Thus, it was established that Guzman's detailed contemporaneous report of the investigation failed to include certain of these conversations (Tr. 74 - 77). Moreover, in a prior trial of the co-defendant, Jesus Sanjurjo, Guzman had not mentioned a particularly important conversation with Torres which he now for the first time claimed occurred (Tr. 57-8; 81-3).* In order to meet the argument of recent

*This conversation was also not included in Guzman's report.

fabrication by Guzman, the prosecutor on redirect examination asked the following questions:

"Q. Detective, who was the defendant on trial in that case to which Mr. Naftalis has directed your attention?

A. Jesus Sanjurjo.

Q. Were you asked during that trial for an account of your conversation with Wilson Torres on the evening of February 14, 1972?

A. No, I was not.

Q. In this trial you mentioned on several occasions you had several conversations with Jesus Sanjurjo?

A. Yes, sir.

Q. Have you recounted those conversations in detail during this trial?

A. No, sir." (Tr. 83).

These questions mislead the jury into believing that in the Jesus Sanjurjo trial, agent Guzman had not testified about his conversations with Wilson Torres on the evening of February 14, 1972. This simply was not so. An examination of the transcript of the Jesus Sanjurjo trial (which was in the possession of the Assistant United States Attorney at trial), shows that agent Guzman in fact testified in detail regarding the events of February 14, 1972, and to the very same conversations that he had testified to at the Torres

trial. The sole exception was the one conversation with Torres which defense counsel argued was a recent fabrication. (Compare pp. Gob. 4-12 of Sanjurjo trial with pp. 45-60 of Torres trial.) The jury was similarly mislead by the prosecutor's redirect examination into believing that there were other conversations with Jesus Sanjurjo which had not been recounted at the Torres trial because Sanjurjo was not on trial. An examination of the transcript of the Sanjurjo and Torres trials demonstrates that Guzman testified to precisely the same conversations with Jesus Sanjurjo at both trials. (Compare Sanjurjo transcript Gob. 7-8 and Gob. 13 with Torres transcript pp. 48-9 and 61-2). Thus, Guzman's testimony that there were other conversations with Jesus Sanjurjo was not accurate and was not corrected by the Government. See Giglio v. United States, 405 U.S. 150, 153 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Honohan, 294 U.S. 103, 112 (1935).

When defense counsel attempted to correct this inaccurate impression by asking clarifying questions on recross and offering in evidence (at the Court's suggestion) the Sanjurjo trial transcript, Government counsel objected and the transcript was not received (Tr. 84-6).

This ruling unfairly restricted the cross-examination of the key Government witness and allowed Guzman to appear truthful to the jury when he was not. The defendant was clearly entitled to show that Guzman had lied regarding his prior testimony. This restriction on the right to cross-examine the key Government witness was reversible error. United States v. Wolfson, 437 F.2d 862, 874-875 (2d Cir. 1970); Harris v. United States, 371 F.2d 365, 366-67 (9th Cir. 1967).

In McConnel v. United States, 393 F.2d 404, 406 (5th Cir. 1968), the Court said:

> "...cross-examination is a right and its availability is essential to fair trial; accordingly, cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope."

In summation, the prosecutor asserted that Guzman had not mentioned the Torres conversation at the Sanjurjo trial because the "focus" of that case was not on Torres:

> "When Jesus Sanjurjo was on trial, the focus is on Jesus, he is the defendant. There is no reason to go into a bunch of conversations with Wilson Torres, or Jose Sanjurjo, or anybody else, because Jesus was on trial. In this trial, this man is the defendant. Doesn't

> it make sense that when this man is the defendant, that the focus is on him, you want to hear about what he said, not what somebody else said? This is just nonsense." (Tr. 321).

This, of course, was not accurate since Torres was charged with conspiracy and Guzman had testified in detail at the Sanjurjo trial about the events of February 14th and his conversations with Wilson Torres and all other alleged participants in the conspiracy.

These misstatements were of critical importance since Guzman's credibility was the key issue at trial and defense counsel's attack on Guzman's credibility had focused on his failure on prior occasions to relate alleged conversations with Torres. Such misstatements by prosecutors require reversal because of the inevitable prejudice to defendants. King v. United States, 372 F.2d 383 (D.C. Cir. 1967); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).

Moreover, the prosecutor in an effort to bolster Guzman's credibility stated his own personal belief that Guzman was a truthful witness. He bluntly told the jury that "I submit that Guzman's testimony was wholly credible. There is no reason in the world why you should disregard his testimony." (Tr. 230)*.

*A motion for a mistrial based on this statement was denied (Tr. 270).

A prosecutor may not interject his own opinion and vouch for the validity of his cause or the credibility of his witnesses. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); United States v. Puco, supra; United States v. Bivona, supra; United States v. White, 486 F.2d 201 (2d Cir. 1973); United States v. Drummond, supra. As the Court said in Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960):

> "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury) would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing."

See also, United States v. Dunn, 307 F.2d 883 (5th Cir. 1962); United States v. Johnson, 331 F.2d 281 (2d Cir. 1964), cert. denied, 379 U.S. 905 (1965); American Bar Association, Code of Professional Responsibility and Canons of Judicial Ethics, Canon 7 (D.R. 7-106).

The prosecutor's obligation is to insure that justice

is done, not to obtain an advantage to insure a conviction. As the Supreme Court pointed out in Berger v. United States, 295 U.S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially is as compelling as its obligation to govern at all; and whose interest is therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the present case, perhaps by the inadvertence on the part of the Assistant United States Attorney, the jury was mislead into believing certain facts were true when they were not. As a result, Mr. Torres was denied a fair trial.

CONCLUSION

For all of the foregoing reasons, the judgment of conviction must be reversed.

Dated: New York, New York
July 3, 1974.

Respectfully submitted,

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